L
25-339

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 910.

HIA
ASSOCIATION

THE STATE OF MISSOURI EX REL: JOHN [illegible]. WALKER,
PLAINTIFF IN ERROR,

vs.

JOHN WALKER, STATE AUDITOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RD FILED MARCH 9, 1887.—AGREED RECORD FILED JANUARY 17, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 910.

THE STATE OF MISSOURI EX REL: JOHN R. WALKER, PLAINTIFF IN ERROR,

vs.

JOHN WALKER, STATE AUDITOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Page.
Caption	1
Application for writ of mandamus	2
Exhibit A—Agreement between Fund Commissioners and John R. Walker, Nov. 28, 1884	6
B—Bond of Walker to State of Missouri, Nov. 28, 1884	8
Respondent's return	10
Judgment	12
Opinion of the court	12
Stipulation as to record	17

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1887.

THE STATE OF MISSOURI, AT THE RELATION OF JOHN R. WALKER,
PLAINTIFF IN ERROR,

vs.

JOHN WALKER, STATE AUDITOR.

WRIT OF ERROR TO THE SUPREME COURT OF MISSOURI.

On November 16th, 1885, the relator filed in the Supreme Court of Missouri his application for a writ of mandamus, which application is as follows, viz:

IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1885.

THE STATE OF MISSOURI, at the relation of John R. Walker,

vs.

JOHN WALKER, State Auditor.

Your relator, John R. Walker, states that heretofore, to-wit: on the 28th day of November, 1884, under and by virtue of an act of the General Assembly of this State, approved March 19th, 1881, and entitled "An act to secure the adjustment and settlement of claims of the State of Missouri against the United States, for enrolling, equipping and subsisting the militia forces thereof in suppressing the rebellion, and also claims of this State for five per cent. upon Government lands disposed of by the United States which have not heretofore been adjusted," he, your relator, was employed by the board of Fund Commissioners of this State, said board consisting of Thos. T. Crittenden, John Walker and Daniel H. McIntyre, as agent on behalf of the State of Missouri, to prosecute to final settlement before Congress and the proper departments at Washington, the claims of the said State against the Government of the United States for the reimbursement of all sums of money which may be due or owing to this State on account of expenditures made or liabilities incurred by said State in enrolling, equipping, subsisting and paying the militia forces of this State in the suppression of the Rebellion, and all other claims of this State against the United States growing out of the late war, and which have not been reimbursed to the State, as well as those claims audited by the commission created by the act of the Legislature of this State, dated March 19, 1874, also the claims of the State under the act admitting her into the Union by which the General Government agreed to

pay to the State five per cent. of the net proceeds of the sales of lands lying within the limits of said State, and which have been disposed of by the General Government subsequent to the admission of the said State of Missouri into the Union, and on which the said five per cent. has not heretofore been paid to the State.

Your relator states that said contract was in writing under seal and duly executed on behalf of the State of Missouri by said Board of Fund Commissioners and by your relator in his own behalf, a duly certified copy of which is hereto attached, marked "Exhibit A."

Your relator further states that by the terms of said contract, it was provided and agreed by and between the parties thereto that the relator herein should be paid and receive as full compensation for and in consideration of his services, in and about his said employment, a commission of five per cent. on the amount collected by him on those claims which were for money already paid out by the State, and a commission of fifteen per cent. on the amount collected on any other class of said claims named in the first section of said act of March 19, 1881, the said relator contracting and agreeing on his part, in consideration of the compensation aforesaid, to proceed without delay to the prosecution of said claims, and to diligently and faithfully prosecute the same to final settlement and collection, if practicable, and that he would faithfully demean himself in the prosecution of said claims and in the transaction of the business so entrusted to him, according to his said contract and the provisions of said act of March 19, 1881, and the tenor and effect of his bond provided for by section 2 of said act and

of even date with said contract. Your relator states that before entering upon the discharge of his duties under said contract, he did, as required by said section 2 of said act of March 19, 1881, enter into a bond to the State of Missouri in the sum of twenty thousand dollars, conditioned that he would faithfully prosecute the aforesaid claims to final settlement and collection, if practicable, and that he would faithfully demean himself in the prosecution of said claims and the transaction of the business entrusted to him; that said bond was duly approved by said Fund Commissioners, a duly certified copy of which said bond is hereto attached and marked "Exhibit B," and that thereafter your relator entered upon the discharge of the duties of his said employment and has continued therein ever since, and has incurred large expense and expended a great deal of time in and about the collection of said claims under his contract, and has faithfully demeaned himself in the prosecution of the same and in the transaction of the business so entrusted to him.

Your relator further states that under and by virtue of the provisions of an act of the General Assembly of this State, approved March 28th, 1885, entitled "An Act to provide for the payment of certain claims against this State for military service rendered during the late civil war, as shown by the pay rolls delivered to the General Government by the Stevenson Commission in January, 1867, and for the collection of any moneys thus expended, from the Government of the United States, and to appropriate money therefor," one James P. Haynes, public administrator of Ray county, Missouri, having in charge the estate of one John King, deceased, who was in his lifetime a private soldier in the late civil war, and was a member of company C,

Fourth provisional regiment of enrolled Missouri militia, filed in the office of the Adjutant General of this State a certain claim for military services so rendered by the said deceased in said late civil war, and your relator further states that said claim was duly verified as required by said act of March 28th, 1885, and that the same was thereafter, on the 5th day of November, 1885, duly allowed in the sum of $466.59, by J. C. Jamison, the Adjutant General of Missouri, and was endorsed and abstracted by said Adjutant General, as required by said last mentioned act of the General Assembly, and thereafter, and in accordance with the provisions of section 7, of said act, said J. C. Jamison, as said Adjutant General, did deliver said allowed claim in duplicate to the Hon. John Walker, State Auditor of Missouri, and said Auditor did thereupon, on the 6th day of November, 1885, draw his warrant on the State Treasurer of said State in favor of the proper party for the amount of the allowance endorsed on said claim by the said Adjutant General, and your relator states that the said State Auditor did then endorse, under his hand and official seal, on both copies of said claim, the date of the issue of said warrant, and the amount thereof, and did file one copy of said claim in his office; and your relator further states that under the provisions of said act of March 28th, 1885, it thereupon was and became the duty of said Auditor to deliver the other copy of said claim, so allowed and endorsed as aforesaid, to your relator, as the agent of the State, under his contract heretofore mentioned, for the collection of the claims of the State against the Government of the United States, to be proceeded with by your relator as is provided in said act.

Your relator states that the said John Walker, State Auditor as aforesaid, although so requested by relator, hath wrongfully refused, and doth still so refuse, to deliver to relator as said agent

of the State, a copy of said allowed and endorsed claim, and that he, your relator, is without other remedy in the premises. Wherefore, he, your relator, prays the issuance by this Honorable Court of its extraordinary writ of mandamus, commanding him, the said State Auditor, to deliver to relator said copy of said allowed and endorsed claim in the sum of $466.58 in favor of said James P. Haynes, as public administrator of Ray county, Missouri, having in charge the estate of said John King, deceased, or that within such time as this court may direct, he show cause why he has not done so.

DRAFFEN & WILLIAMS AND SMITH & KRAUTHOFF,
Attorneys for Relator.

The exhibits referred to in the foregoing petition are as follows :

"EXHIBIT A."

This agreement, made and entered into by and between Thomas T. Crittenden, John Walker and Daniel H. McIntyre, Fund Commissioners for and on behalf of the State of Missouri, parties of the first part, and John R. Walker, of Boonville, Cooper county, Missouri, party of the second part, Witnesseth:

That the said Fund Commissioners have this day employed John R. Walker, the said party of the second part, under the act of the General Assembly of the State of Missouri, approved March 9th, 1881, as agent to prosecute to final settlement before Congress and the proper departments at Washington, the claims of the State of Missouri against the Government of the United States, for the reimbursement of all sums of money which may be due or owing to this State, on account of expenditures made or liabilities incurred by said State in enrolling, equipping, subsisting and

paying the militia forces of this State in the suppression of the rebellion, and all other claims of this State against the United States growing out of the late war, and which have not been reimbursed to the State, as well as those claims audited by the commission created by the act of the Legislature of this State, dated March 19th, 1874.

Also, the claims of this State under the act admitting her into the Union, by which the General Government agreed to pay to the State five per cent. of the net proceeds of the sale of lands lying within the limits of said State, and which have been disposed of by the General Government subsequent to the admission of the State of Missouri into the Union, and on which the said five per cent. has not heretofore been paid to the State, and it is agreed by and between the said parties hereto, that the party of the second part shall receive as full compensation for his services to be paid on the sums collected, as provided in the fourth and fifth sections of said act of March 19th, 1881, and not otherwise, a commission on the amount collected by him of five per cent. on the amount collected, on those claims which are for money already paid out by this State, and in like manner a commission of fifteen per cent. on the amount collected on any other class of said claims named in the first section of the said act. And the said party of the second part agrees, for and in consideration of the compensation hereinbefore mentioned and set out, that he will proceed without delay to the prosecution of the said claims at his own expense, and diligently and faithfully prosecute the same to final settlement and collection, if practicable, and that he will faithfully demean himself in the prosecution of said claims and the transaction of the business hereby intrusted to him, according to the provisions of the

said act of March 19th, 1881, and the tenor and effect of his bond provided for in section two of said act of even date herewith.

In testimony whereof we have hereunto set our hands and seals at the City of Jefferson, in the State of Missouri, on this 28th day of November, A. D., 1884.

THOS. T. CRITTENDEN, [SEAL.]
JOHN WALKER, [SEAL.]
D. H. McINTYRE, [SEAL.]
} Fund Commissioners of Missouri.

JOHN R. WALKER, [SEAL.]

I, John Walker, State Auditor of Missouri, do hereby certify that the above and foregoing is a true copy of the contract between the Fund Commissioners of Missouri and John R. Walker, of Boonville, said State.

Done at office in the City of Jefferson, this 14th day of November, 1885.

[SEAL.] JOHN WALKER, State Auditor.

"EXHIBIT B."

Know all men by these presents, that we, John R. Walker, as principal, and James M. Nelson, William Speed Stephens, Lon V. Stephens, Nicholas Walz and Addison A. Walker, as securities, all of the county of Cooper and State of Missouri, are held and firmly bound unto the State of Missouri in the sum of twenty thousand ($20,000) dollars, for the payment of which we bind ourselves, our heirs, executors and administrators.

The conditions of the above bond is, that whereas, the said John R. Walker was, on the 28th day of November, A. D., 1884, appointed and employed as agent of the State of Missouri to prosecute to final settlement before Congress and the proper

departments at Washington, the claims of the State of Missouri against the Government of the United States, for reimbursement of all sums of money which may be owing or due to the State of Missouri on account of expenditures made or liabilities incurred by said State in enrolling and equipping, subsisting and paying the militia forces of said State of Missouri in the suppression of the rebellion, and all other claims of this State against the Government of the United States growing out of the late war, and which have not been reimbursed to the State, as well as those claims audited by the Commission created by the act of the Legislature of this State, dated March 19th, 1874, and also the claims of the State under the act admitting her into the Union, by which the General Government agreed to pay to this State five per cent. of the net proceeds of the sale of lands lying within the limits of said State, and which has been disposed of by the General Government subsequent to the admission of the State of Missouri into the Union, and on which the five per cent. has not heretofore been paid to the State, by Thomas T. Crittenden, Governor, Daniel H. McIntyre, Attorney-General, and John Walker, State Auditor of the State of Missouri, they being the Fund Commissioners of the State of Missouri, under and in pursuance of an act of the General Assembly of the State of Missouri, approved March 19th, 1881, and entitled An act to secure the adjustment and settlement of claims of the State of Missouri against the United States, for enrolling, equipping and subsisting the militia forces thereof in suppressing the rebellion. Also, claims of this State for five per cent. upon Government lands disposed of by the United States, which have not heretofore been adjusted.

Now, if the said John R. Walker, agent of the State of Missouri as aforesaid, shall faithfully prosecute said claims to final

settlement and collection, if practicable, and shall faithfully demean himself in the prosecution of said claims and the transaction of the business entrusted to him, then the above bond to be void, otherwise to remain in full force and effect.

Witness our hands and seals, this 28th day of November, 1884.

JOHN R. WALKER, [SEAL.]
JAMES M. NELSON, [SEAL.]
W. SPEED STEPHENS, [SEAL.]
LON V. STEPHENS, [SEAL.]
NICHOLAS WALZ, [SEAL.]
ADDISON A. WALKER, [SEAL.]

JEFFERSON CITY, Mo., November 28, 1884.

We hereby approve the above bond as made and signed.

THOMAS T. CRITTENDEN,
JOHN WALKER,
D. H. McINTYRE,
} Fund Commissioners of Missouri,

I, John Walker, State Auditor of Missouri, do hereby certify that the above and foregoing is a true copy of the bond of John R. Walker, agent of the State of Missouri, for the collection of the claims of the State of Missouri against the Government of the United States, as the same appears on file in my office.

Witness my hand and seal of office this 14th day of November, A. D., 1885.

[SEAL.] JOHN WALKER, State Auditor.

RESPONDENT'S RETURN.

The issuance of the alternative writ was waived by the respondent, and on the 23d day of November, 1885, respondent filed his demurrer, as follows, to-wit :

"IN THE SUPREME COURT OF THE STATE OF MISSOURI,
October Term, 1885.

THE STATE OF MISSOURI, AT THE RELATION OF JOHN R. WALKER,

vs.

JOHN WALKER, STATE AUDITOR.

Now comes the respondent herein, and for return to the alternative writ of mandamus issued in this cause, and demurs to said writ, for the following reasons, to-wit:

1st. Because said writ does not state facts sufficient to constitute a cause of action.

2d. Because the act of the General Assembly of this State, approved March 19th, 1881, entitled "An act to secure the adjustment and settlement of claims of the State of Missouri against the United States for enrolling, equipping and subsisting the militia forces thereof in suppressing the rebellion, and also claims of this State for five per cent. upon the Government lands disposed of by the United States, which have not heretofore been adjusted," under which relator herein was appointed agent, as set out in the alternative writ, was repealed by an act of the General Assembly of this State, approved March 28th, 1885, entitled "An act repealing an act entitled 'An act to secure the adjustment and settlement of claims of the State of Missouri against the United States, for enrolling, equipping and subsisting the militia forces thereof in suppressing the rebellion; also, claims of this State for five per cent. upon Government land disposed of by the United States, which have not heretofore been adjusted, entitled of militia, approved March 19th, 1881.'"

3d. Because sections 7 and 9 of an act of the General Assembly of this State, approved March 28th, 1885, set out in the

alternative writ and entitled "An act to provide for the payment of certain claims against this State for military service rendered during the late civil war, as shown by the pay rolls delivered to the General Government by the Stevenson Commission in January, 1867, and for the collection of moneys thus expended, from the Government of the United States, and to appropriate money therefor," are null, void and of no force or effect and in conflict with and in violation of section 52 of article 4 of the constitution of the State of Missouri.

A. M. HOUGH WITH B. G. BOONE,
Attorney-General.

JUDGMENT.

On December 21st, 1885, the Supreme Court of Missouri rendered the following judgment in this cause:

"Now at this day come again the parties aforesaid by their respective attorneys, and the court here now being sufficiently advised of and concerning the premises, do consider and adjudge that the first and third grounds of demurrer to the alternative writ of mandamus herein, be and the same are hereby overruled. It is further considered and adjudged that the second ground of demurrer to the alternative writ of mandamus herein be and the same is hereby sustained, and that the peremptory writ of mandamus prayed for be denied, and that the said respondent recover against the said relator his costs and charges herein expended and have thereof execution. (Opinion filed.)"

Which opinion was as follows:

OPINION OF THE COURT.

For the purpose of pleading, the petition, by consent, is

treated as an alternative writ of mandamus, and the respondent has filed a return thereto. The act of March 19, 1881, (Acts of 1881, p. 163,) gave the Fund Commissioners authority to employ an agent to prosecute to final settlement before Congress and the departments, the claims of the State against the United States (1) for reimbursement of moneys due the State on account of expenditures and liability incurred in equipping, etc., the militia in the late war; (2) all other claims audited by the Commission created by the act of March 19, 1874, and (3) claims of five per cent. of proceeds of sales of certain lands. The third section of the act directs designated State officers, on the order of the Governor, to deliver to the agent, accounts, pay rolls, vouchers, etc., and gives general directions as to what disposition the agent shall make of these documents. On the 28th of November, 1884, the Fund Commissioners entered into a contract with the relator by which he was appointed the agent of the State for the purpose stated in the act. He gave bond, conditioned that he would faithfully prosecute the claims to final settlement, if practicable, and that he would faithfully demean himself in the business entrusted to him. By the terms of the contract he is required to prosecute the claims at his own expense. As compensation, he is allowed five per cent. on the amount collected on certain classes of the claims, and on the others he is to receive fifteen per centum of the amount collected. By the terms of the act he is to receive his commission from the officers of the United States, and they are required to pay the residue directly to the State officers. The relator entered upon the discharge of his duties and has continued to discharge the same ever since, and has incurred large expenses and expended much time in and about the collection of the claims, and it is conceded he has faithfully demeaned himself in the business intrusted to him.

The General Assembly, by the act of March 28, 1885, (Acts of 1885, p. 205,) repealed the entire act of 1881 without any saving clause. The relator has demanded of the State Auditor a certain voucher, which the latter declines to turn over to him because of the repealing act of 1885. The claim, or voucher, in question, is one allowed by the Adjutant-General since the passage of the repealing act. The question, therefore, is: Did the repealing act divest the relator of his right to have and collect this voucher? His position is that the act impaired the obligation of his contract, and is, therefore, void. Contracts made between the State and an individual are as binding upon the State as if the State was an individual. It cannot impair the obligation of its own contract. As was said in *State v. Hawthorne*, 9 Mo., 390, the Legislature can no more violate a contract made by themselves or under their authority than they can rescind or alter, or impair the obligation of one made between private individuals. This principle of law is well established *State ex rel. Attorney-General vs. Miller et al.*, 66 Mo., 329; *State ex rel. vs. Barker*, 4 Kans., 379; *Davis vs. Gray*, 16 Wall. 203, 232. Or, as was said in *Hall vs. Wisconsin*, 103 U. S., 5, when a State descends from the plane of its sovereignty, and contracts with private persons, it is regarded, *pro hac vice*, as a private person itself, and is bound accordingly. As that case is much relied upon, it may be well enough to say that the Governor of that State, by authority of law, employed Hall, with others, to make a geological survey of the State. By another act, Hall was made principal of the commission. His contract continued to a fixed period, and he was to receive a specified compensation and his expenses, and the expenses of his department. Before the contract expired, the Legislature repealed the laws by virtue of which he was employed. He continued his

work until the expiration of his contract period. In the suit, which was to recover for his services from the repeal of laws to the expiration of his contract, it was ruled that he was not a public officer, and that he was entitled to recover, notwithstanding the repeal of the laws.

But do these principles of law control this case? By recurring to the act of 1881 and the contract, it will be seen that the Fund Commissioners were authorized to appoint an agent. Relator was thus appointed as the agent of the State for designated purposes. His duties are, in a measure, defined by the act. His acts are to be done for and in the name of the State, and not in his own name. In short, he is, by the scope and purport of the act, made the agent of the State to transact for it certain business. In general, the principal has a right to determine or revoke the authority given to his agent at his own pleasure, for, since the authority is conferred by his mere will, and is to be executed for his own benefit and his own purposes, the agent cannot insist upon acting when the principal has withdrawn his confidence, and no longer desires his aid. Story on Agency, (9 Ed.) sec. 463. There are exceptions to the rule, as where the power is given as a part of a security, or for a valuable consideration, but these exceptions can have no application in this case. Another exception is where the power or authority is coupled with an interest. Story on Agency, sec. 477; Whart. on Agency, sec. 95.

But the interest in such cases is an interest in the subject on which the power is to be exercised. An interest in that which is produced by the exercise of the power is not sufficient. The power must be engrafted on an interest in the property on which the power is to be exercised, and not an interest in the money

derived from the exercised of the power. *Hunt v. Rausmanier's Adm'r*, 8 Wheat., 174; *Barr v. Schroeder*, 32 Cal., 609; *Coffin v. Landis*, 46 Pa. St., 431; *Blackstone v. Buttermore*, 53 Pa. St., 266. A power to collect money and receive property, and to sell and convey the property of the principal, the agent to have one-half of the net proceeds as compensation, is not a power coupled with an interest, and is revocable. *Hartley's Appeal*, 53 Pa. St., 212. It may be that a right has arisen in favor of the relator to be indemnified for his expenses and the like. *United States v. Jarvis*, Davies's R., 274; *Walker v. Denison*, 86 Ill., 142. But such matters cannot be settled in this contest, even if the State could be sued. The contract in *Hall v. State of Wisconsin*, *supra*, was essentially one of ordinary employment. Here, it is one of agency, pure and simple. If, as between individuals, the agency may be revoked, no reason is seen why the State may not do the same under like circumstances. No period of duration of the agency in question is fixed either by the statute or contract, and it cannot be that the State has lost its power to recall its agent by reason of anything in the statute or contract. We conclude the State had the right to revoke this agency, and that it did so by the repealing act, which was passed with an emergency clause. There is nothing in the other act, passed on the same day, that militates against this conclusion.

The demurrer is sustained, and final judgment will be entered thereon. All concur. F. M. BLACK, J.

In Supreme Court of United States. October Term, 1887.

THE STATE OF MISSOURI at the relation of JOHN R. WALKER, Plaintiff in Error,

vs.

JOHN WALKER, State Auditor, Defendant in Error.

Now come the parties to the above cause & stipulate & agree that the printed pages, from one to sixteen, inclusive, of printed matter heretofore sent by plaintiff in error, shall be the record on which the above cause shall be tried on the writ of error.

WILLIAM M. WILLIAMS,
Attorney for Plaintiff in Error.

B. G. BOORD,
Att'y Gen. of Mo., for Def't in Error.

[Endorsed:] Supreme Court U. S., 1887, Oct'r term. No. 910. The State of Missouri *ex rel:* John R. Walker, pl'ff in error, *vs.* John Walker, State auditor. Stipulation as to printed record.

[Stamped:] Office Supreme Court U. S. Filed Jan. 17, 1888. James H. McKenney, clerk.

125-339

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 910.

THE STATE OF MISSOURI, AT THE RELATION OF JOHN R. WALKER, PLAINTIFF IN ERROR,

vs.

JOHN WALKER, STATE AUDITOR, DEFENDANT IN ERROR.

MOTION TO ADVANCE.

Now comes the plaintiff in error in the above cause, and moves and asks the court to advance the same on its docket and to set it down for an early hearing, and said plaintiff assigns reasons as follows in support of this motion:

1. That this proceeding is one by mandamus, instituted in the supreme court of Missouri, against defendant, John Walker, State Auditor of Missouri, in his official capacity, and in which the peremptory writ was denied; that the term of office of said auditor is for four years from the second Monday in January, 1885; that the writ of error in the pending cause was returned to the present term of this court, and unless this cause is advanced, as asked, the term of office

of defendant in error, as said State auditor, will expire before this cause can be regularly reached on the docket.

2. The case is one of public importance, involving the right of the State of Missouri to annul by an act of its Legislature a contract made by said State with relator, by the terms of which, for an agreed compensation, the relator was employed to prosecute certain claims against the Government of the United States.

WM. M. WILLIAMS,
Attorney for Plaintiff in Error.

I concur in asking that the above motion to advance the cause be sustained for the reasons assigned in the motion.

B. G. BOONE,
Attorney General of Missouri, for Defendant in Error.

BRIEF ON MOTION TO ADVANCE.

For the advancement of the cause on the docket we rely on the decision of this Court in the case of United States *ex rel.* McLeod *vs.* Sherman, where the motion to advance was sustained on the ground that the term of the office of Secretary Sherman might expire before the case could be reached on the regular call.

See Phillips' Practice (5 ed.), page 291.

See also printed abstract of record of plaintiff in error, pp. 17, 18, 29, herewith filed.

WM. M. WILLIAMS,
Attorney for Plaintiff in Error.

125-339

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 910.

THE STATE OF MISSOURI EX REL: JOHN R. WALKER, PLAINTIFF IN ERROR,

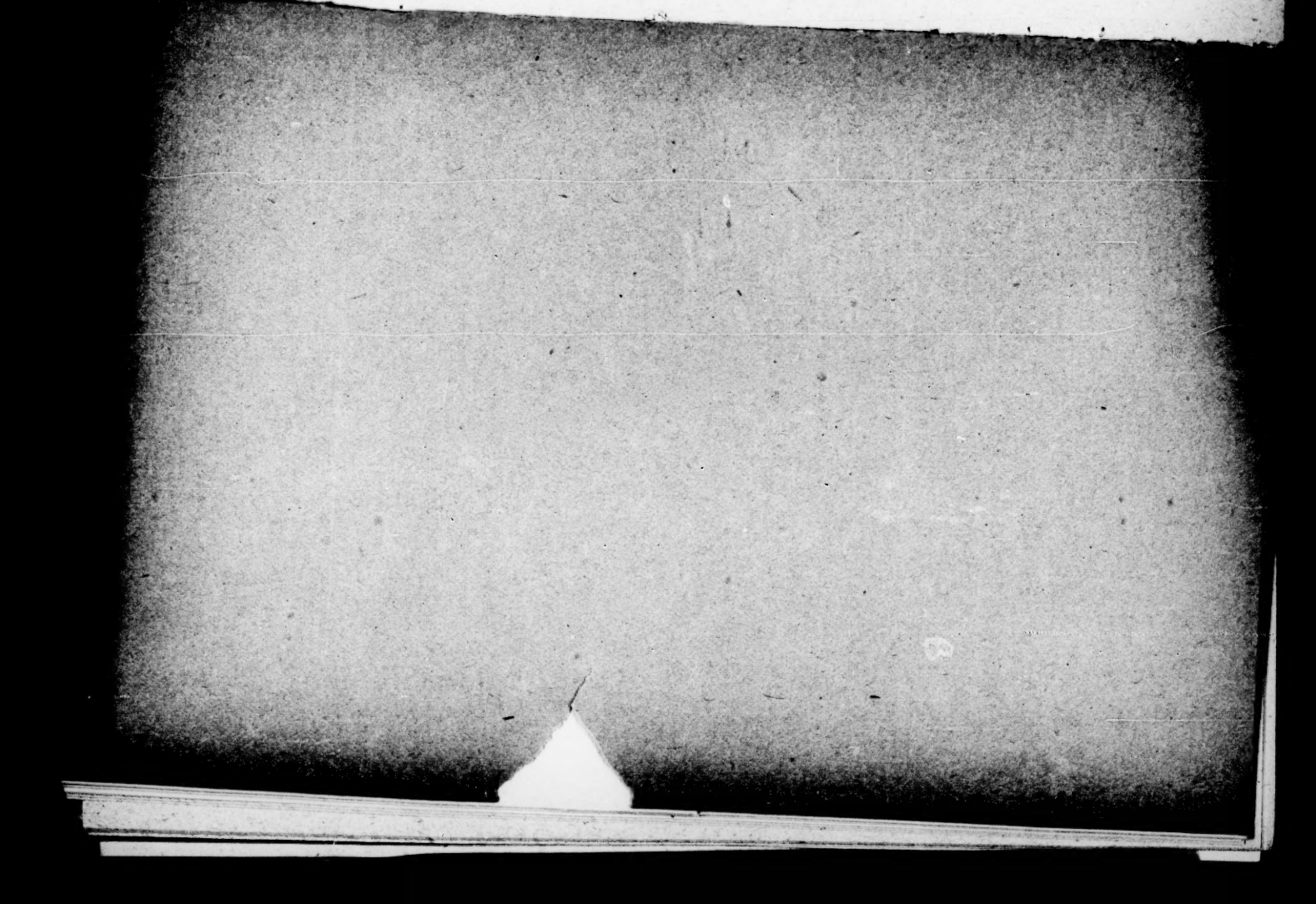
vs.

JOHN WALKER, STATE AUDITOR.

BRIEF FOR THE PLAINTIFF IN ERROR,

BY

WILLIAM M. WILLIAMS,
His Attorney.



—IN THE—

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1887.

THE STATE OF MISSOURI, AT THE RELATION OF JOHN R. WALKER,
PLAINTIFF IN ERROR,

vs.

JOHN WALKER, STATE AUDITOR, Defendant in Error.

Now comes the plaintiff in error in the above cause, and moves and asks the court to advance the same on its docket and to set it down for an early hearing, and said plaintiff assigns reasons as follows in support of this motion:

1. That this proceeding is one by mandamus, instituted in the Supreme Court of Missouri against the defendant, John Walker, State Auditor of Missouri, in his official capacity, and in which the peremptory writ was denied; that the term of office of said Auditor is for four years from the second Monday in January, 1885; that the writ of error in the pending cause was re-

turned to the present term of this court, and unless this cause is advanced, as asked, the term of office of the defendant in error, as said State Auditor, will expire before this cause can be regularly reached on the docket.

2. The case is one of public importance, involving the right of the State of Missouri to annul by an act of its Legislature a contract made by said State with relator, by the terms of which, for an agreed compensation, the relator was employed to prosecute certain claims against the Government of the United States.

WM. M. WILLIAMS,
Attorney for Plaintiff in Error.

I concur in asking that the above motion to advance the cause be sustained for the reasons assigned in the motion.

B. G. BOONE, Att'y Gen. of Missouri,
For Defendant in Error.

STATEMENT.

The Legislature of Missouri, by an act entitled "An act to secure the adjustment of claims of the State of Missouri against the United States, for enrolling, equipping and subsisting the militia forces thereof in suppressing the rebellion, and also claims of this State for five per cent. upon Government lands, disposed of by the United States, which have not heretofore been adjusted," approved March 19th, 1881, (Session acts of 1881, p. 163) authorized and empowered the Fund Commissioners of Missouri, consisting of the Governor, Attorney-General and State Auditor, if they should deem it expedient, to *employ* a competent agent to prosecute to final settlement, before Congress and the proper departments at

Washington, the claims of the State of Missouri against the United States, "for reimbursement of all sums of money which may be due or owing to this State, on account of expenditures made or liabilities incurred by said State in enrolling, equipping, subsisting and paying the militia forces of this State, in the suppression of the rebellion, and all other claims of this State growing out of the late war, and which have not been reimbursed to the State, as well as those claims audited by the commission, created by the act of the Legislature of this State, dated March 19, 1874; also, the claims of this State under the act admitting her into the Union, by which the General Government agreed to pay to this State five per cent. of the net proceeds of the sale of lands lying within the limits of said State, and which have been disposed of by the General Government subsequent to the admission of the State of Missouri into the Union, and on which said five per cent. has not heretofore been paid to the State." The second section of the act required the person thus *employed* to enter into bond with securities, conditioned that he *would faithfully prosecute said claims to final settlement and collection*, if practicable, and that he would faithfully demean himself in the prosecution of said claims *and the transaction of the business entrusted to him.*

The fourth section provided that the agent employed under the authority of that act, should prosecute the claims at his own expense, and receive as full compensation for his services such commission on the amount collected by him as should be agreed [illegible] by the said agent and the Fund Commissioners, not to exceed five per cent. on the amount collected on those claims, which are for money already paid out by the State, and not to exceed fifteen per cent. on the amount collected on any other class of said claims.

The fifth section provides that the proper officers of the Government of the United States shall pay direct to the said agent his commissions, upon the production by said agent of a duly certified copy of his *contract with said Fund Commissioners*, and that the amount due the State should be paid to the State Treasurer.

While this act was in force, the Fund Commissioners, under the authority conferred upon them by its terms, made a contract upon behalf of the State with the relator, for the prosecution by him of the claims mentioned in said act. This contract obligated the relator, upon his part, to devote his time and attention to the collection of said claims, and to prosecute the same at his own expense before Congress and the proper departments. He was further required to enter into a bond in the penal sum of twenty thousand dollars, conditioned for the faithful performance of the contract on his part. The State, through the said Fund Commissioners, who acted under the authority of the above law, contracted with the relator, that in consideration of his devoting his time and attention to the collection of said claims, and of his agreement to prosecute the same at his own expense, he should receive a commission of five per cent. on the amount collected by him on those claims, which are for money already paid out by the State, and fifteen per cent. on the amount collected on any other class of said claims. This contract was duly executed by the relator upon his part, and by the Fund Commissioners upon the part of the State. He entered upon the active performance of the duties enjoined upon him under the terms of his contract, and since the date thereof, has devoted the time and attention to said claims, required by its terms.

By an act approved March 28th, 1885, (Laws of Mo., 1885, p. 203,) the State Auditor was required to deliver to the relator, as such

agent, certain papers, to be used by him in the prosecution of said claims.

The relator, by this proceeding, seeks to compel the Auditor to deliver to him one of the vouchers mentioned in said act of March 28th, 1885, and necessary to be used by him in the fulfillment of his contract.

The defendant waived the issuing of an alternative writ, and demurred on several grounds, all of which were overruled, except the one founded on the repeal, by the subsequent act of 1885, of the act of the Legislature of Missouri, under which relator's contract was made. On this last ground, alone, the demurrer was sustained, and the Federal question here presented, is, whether such repeal, under the constitution of the United States, can operate to affect relator's contract.

The Supreme Court of Missouri, it will be seen, placed its decision on the sole ground that the repealing act revoked relator's agency and deprived him of the right to proceed under his contract to collect the claims authorized by it. *This ruling is the error assigned by plaintiff in error.*

The Statutes of Missouri referred to *supra* and relating to this case are as follows:

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. The Fund Commissioners of this State, consisting of the Governor, Attorney-General and State Auditor, are hereby fully authorized and empowered, if they deem it expedient, to em-

ploy a competent agent to prosecute to final settlement before Congress and the proper departments at Washington the claims of the State of Missouri against the Government of the United States for reimbursement of all sums of money which may be due or owing to this State on account of expenditures made or liabilities incurred by said State in enrolling, equipping, subsisting and paying the militia forces of this State in the suppression of the rebellion, and all other claims of this State against the United States growing out of the late war, and which have not been reimbursed to the State, as well as those claims audited by the commission created by the act of the Legislature of this State, dated March 19, 1874. Also, the claims of this State under the act admitting her into the Union, by which the General Government agreed to pay to this State five per cent. of the net proceeds of the sale of lands lying within the limits of said State, and which has been disposed of by the General Government, subsequent to the admission of the State of Missouri into the Union, and on which the said five per cent. has not heretofore been paid to the State.

SEC. 2. The agent thus employed shall, before entering upon the discharge of his duties, be required to enter into bond to the State of Missouri, to be approved by the said Fund Commissioners, with not less than five solvent securities, and in a sum to be fixed by the officers approving the same, conditioned that he will faithfully prosecute said claims to final settlement and collection, if practicable, and that he will faithfully demean himself in the prosecution of said claims and the transaction of the business entrusted to him.

SEC. 3. With a view to the prompt and satisfactory settlement of the claims of this State against the Government of the United States, and referred to in this act, the Adjutant-General,

State Auditor and other officers of the State having in their possession any papers, accounts, pay-rolls, orders, receipts, vouchers or other evidences of indebtedness necessary to the establishment of said claims, shall, upon the written order of the Governor, deliver to such agent all such papers, documents, pay-rolls, receipts, vouchers or other evidences of indebtedness, (or authenticated copies of the same, where such copies will answer), and take his receipt for the same; and in all cases wherein it is held by the Government of the United States to be necessary to the establishment of said claims, that such original papers, pay-rolls, vouchers, receipts or orders, etc., should be filed in the departments at Washington, it shall be the duty of the agent, and he is hereby authorized, to deliver the same to the proper authorities to be so filed, but before delivering the said original papers he shall withdraw from file all authenticated copies of the same heretofore filed by this State or the agents thereof; and in all cases wherein copies shall not have been made of such original papers, etc., as it may be necessary to file as aforesaid, it shall be the duty of said agent to prepare, or cause to be prepared and properly authenticate, copies of the same, which copies so made, together with those heretofore made and by him withdrawn from file as herein above provided for, shall be returned by such agent to the proper State officers of this State, and the fact of the return of such copies shall be by said officers, respectively, certified to the Governor of this State.

Sec. 4. The agent employed under authority of this act, shall prosecute said claims at his own expense, and shall receive as full compensation for his services such commission on the amount collected by him as may be agreed on between said agent and the said Fund Commissioners, which commission shall not exceed five per

cent. on the amount collected on those claims which are for money already paid out by this State, and shall not exceed fifteen per cent. on the amount collected on any other class of said claims.

SEC. 5. On all sums collected by such agent under the provisions of this act, the proper officers of the United States Government shall be authorized to pay to such agent the commission thereon to which such agent may be entitled, under the agreement made as aforesaid with the said Fund Commissioners, on presentation by said agent of a duly certified copy of his said contract with the said Fund Commissioners, and the residue of said sum or sums shall be paid by said officers to the Treasurer of this State.

SEC. 6. All sums of money which shall be paid to the agent employed under the provisions of this act, and to the State Treasurer, as herein above provided for, shall be receipted for by them respectively, and such receipts shall be in such language and form as may be prescribed under the laws of the United States and the rules and regulations of the Treasury Department thereof, and copies of the same shall be filed with the officer of the Government of the United States paying said money, and also in the office of the Auditor of this State, and such receipts shall be a full acquittance and discharge for all moneys thus paid by the Government of the United States to this State.

SEC. 7. When any payment is made by the United States Government to the Treasurer of this State, in accordance with the provisions of this act, he shall be responsible for the money so paid to him under his official bond the same as for the State revenue and other funds in his hands, and the amounts so received by him shall be charged against him on the books of the State Auditor.

Approved March 19, 1881. (Laws 1881, p. 163.)

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Any person holding a claim against this State for military service rendered during the late civil war, which claim appears upon the "record of unpaid claims," on file in the office of the Adjutant General of the State, as well as on the pay-rolls of Missouri military organizations now on file in the Treasury Department of the United States, and which claim has not been paid by the State or audited by the State Military Commission, created under authority of the law of March 19, 1874, may, by compliance with the provisions of this act, and within the time herein limited, file the same in the office of the Adjutant-General of this State for examination and allowance.

SEC. 2. Such claims shall be so filed within twelve months from the date of this act; and all such claims not so filed within said period shall be forever barred.

SEC. 3. For the purpose of insuring the payment of the claims herein provided for to the proper claimant who rendered the service, or to his widow, executor or administrator, and to prevent fraud in the collection of said claims, such claims shall be prepared and made in duplicate, in the usual form of pay account receipts, verified by the affidavit of the claimant, or if dead, by the affidavit of his widow, administrator or executor, and receipted by the party collecting the same under the provisions of this section; the warrant for such service shall be drawn and delivered by the State Auditor to the person rendering such service, or to his widow, administrator or executor, if he be dead, or if it be inconvenient for any such party to apply in person to the State Auditor for any such warrant, then it shall be lawful for any such person, his

widow, administrator or executor, to authorize the Sheriff or Probate Judge of the county in which any such person resides, by proper power of attorney, to receive such warrant and collect the money thereon from the Treasurer and pay the said amounts so collected to the parties herein entitled to receive it; but no such power of attorney shall be made until after the passage of this act, and any such Sheriff or Probate Judge collecting any claims under this act shall receive, as his compensation for his services in collecting any such claim, any amount agreed upon by the party in interest: provided, the amount agreed upon shall, in no case, exceed five per cent. of the amount actually collected.

SEC. 4. It shall be the duty of the Adjutant-General to prepare and keep in his office an abstract of such claims as may be filed under the provisions of this act, which abstract shall show the name of the claimant, the company of which he was a member, as well as the regiment to which such company belonged, when attached to any regiment, the rank or title of the claimant in such organization, the dates of the beginning and termination of the period of service for which such claim is made, the total amount claimed to be due on account thereof, and the amount, if anything, finally allowed thereon.

SEC. 5. It shall be the duty of the Adjutant-General, upon the filing of any claim as hereinbefore provided for, and as soon as the claim shall have been properly entered on the abstract herein required to bo kept by him, to apply to the Third Auditor of the Treasury Department of the United States for a statement of the exact amount, if anything, shown by the pay-rolls on file in said department to be due to said claimant, after deducting all proper payments and stoppages, appearing on said rolls or the records of said department.

SEC. 6. Upon receiving, in any case, from the Treasury Department of the United States, the statement contemplated in the last preceding section, the Adjutant-General, after satisfying himself from the records in his office that such claim has neither been paid by the State or allowed by the commission mentioned in the first section of this act, shall endorse on the duplicate copies of such claim, and under his hand and the seal of his office, his allowance of so much thereof as may have been certified by the treasury officials to be due, and properly note the date and amount of such allowance on the abstract of such claims hereinbefore provided for; and in case it shall be found that nothing is due on any any claim so filed, such fact shall be properly endorsed thereon, and also noted on said abstract.

SEC. 7. It shall be the duty of the Adjutant-General, after allowing, endorsing and abstracting any claim as hereinbefore provided for, to deliver the same, in duplicate, to the state auditor, who shall thereupon draw his warrant on the state treasurer in favor of the party entitled thereto for the amount of the allowance endorsed on said claim; and after endorsing, under his hand and official seal, the date of the issue of his said warrant, and the amount for which issued in each case, on both copies of said claim, he shall file one copy thereof in his office and deliver the other to the agent for the collection of the claims of the state against the government of the United States, who shall duly receipt for the same.

SEC. 8. It shall be the duty of the said agent of the state to prepare, present and prosecute to settlement, the demands of the state for reimbursement by the government of the United States, of such sums of money as may be paid out under the provisions of this act; and as full compensation for such services, said agent shall receive the amount of his expenses actually incurred in the prose-

cution of said work; and when such collection shall have been made said agent shall file a statement of his said expenses, verified by his oath, with the state auditor, who shall thereupon draw his warrant upon the state treasurer in favor of said agent for the amount of said bill of expense: provided, however, that the amount paid on said bill of expense shall not exceed five per cent. of the amount of the collection so made for the state.

SEC. 9. For the purpose of carrying into effect the provisions of this act the sum of twenty-five hundred dollars is hereby appropriated out of any funds in the treasury not otherwise appropriated.

SEC. 10. All acts or part of acts in conflict with this act or inconsistent herewith are hereby repealed.

Approved March 28, 1885. (p. 203.)

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That an act entitled "an act to secure the adjustment and settlement of claims of the state of Missouri against the United States for enrolling, equipping and subsisting the militia forces thereof, in suppressing the rebellion, and also claims of this state for five per cent. upon government lands disposed of by the United States, which have not heretofore been adjusted," entitled "of militia," approved March 19th, 1881, be and the same is hereby repealed.

SEC. 2. By reason of the fact that the best interests of the state of Missouri may suffer by delay, creates an emergency within the meaning of the constitution; therefore, this act shall take effect and be in force from and after its passage.

Approved March 28, 1885. (Laws 1885, p. 205.)

ADVANCEMENT OF CAUSE.

For the advancement of the cause on the docket we rely on the decision of this court in this case of *United States Ex rel McLeod v. Sherman*, where the motion to advance was sustained on the ground that the term of the office of Secretary Sherman might expire before the case could be reached on the regular call.

See Phillips' Practice, (5th Ed.,) page 291.

BRIEF FOR PLAINTIFF IN ERROR.

It will be seen from what has been said *ante* that the State of Missouri, by an act of its General Assembly, authorized its Fund Commissioners to employ an agent to collect certain claims against the United States. The contract was formally entered into. By its provisions and of the statute authorizing it, the relator was to prosecute the claims to final settlement and collection, to pay his own expenses, and to be compensated out of the sums collected. He gave bond for the faithful performance of his work, and entered upon its discharge, and was engaged therein, having devoted both time and money thereto. After this had occurred the General Assembly of Missouri passed an act repealing the law under which the contract was made.

The Supreme Court of Missouri decided that the repealing act terminated relator's employment and revoked his right to proceed under his contract. The ruling of the court in this particular is the one complained of.

The judgment below denying a peremptory writ of mandamus, was based solely on the above ruling.

We submit that it is in conflict with the provisions of article 1, section 10, of the constitution of the United States, which declares that no State shall "pass a law impairing the obligation of contracts."

I.

A State can no more impair the obligation of its own contract than it can one between individuals.

Davis v. Gray, 16 Wallace, 203.

Hall v. Wisconsin, 103 U. S., 5.

A contract between a State and a party whereby he is to perform certain duties at a stipulated compensation is within the protection of the constitution, and on his executing it he is entitled to that compensation, although before the expiration of the period the State repealed the statute pursuant to which the contract was made.

Hall v. Wisconsin, *supra*.

The case at bar falls within the doctrine announced in the last case.

The broad contention is that the repealing act of 1885 annulled and destroyed relator's right to proceed under his contract. That such a construction impairs its obligation cannot be successfully controverted. The contract invested the relator with the right to collect all claims embraced within its terms and the act authorizing it. Any subsequent legislation which in anywise lessened his rights or decreased the number or the classes of the claims, covered by its terms, to be delivered to him for collection or abridged the intention of the parties as expressed in it or which changed the construction to be given as the contract was originally made, impairs its obligation.

Story on Constitution, (4th Ed.) Secs 1385–1386.

The contract in this case is to do specified work, and in what respect does it differ in principle from an ordinary one for the erection or repair of public buildings or for public printing and the like. The mere use of the term *agent*, we submit, should not be a controlling circumstance to defeat relator's right, in view of all the stipulations entered into and the attendant facts. The court should look further, and not determine the case on the mere employment of terms.

II.

But it is claimed and so held by the learned supreme court of Missouri that the relator's employment is one of agency, pure and simple, and that the State as principal could revoke relator's agency and dismiss him therefrom. We submit this position cannot be sustained.

1. It has been expressly decided by this court that the employment of an attorney to collect a claim, the attorney to be paid a certain part of the proceeds collected, *is a power coupled with an interest* and that even the death of an administrator who had made the contract could not terminate the employment. That the administrator's successor was bound by the contract.

Jeffries v. Ins. Co., 110 U. S., 305, p. 310.

We submit this case is decisive of the question here involved.

2. The case of Hunt v. Rousmanier's, Administrator, 8 Wheaton, 174, does not help the defendant in error. The court will observe that in that case Chief Justice Marshal expressly held that *the principal in his lifetime could not have revoked the agency* in question in that case, and the decision was put on the ground that the principal having died and it not being an agency coupled with an interest, it was terminated by the death of the principal. The State of Missouri the principal in this contract is not *deceased.* Besides the decision in Jeffries v. Ins. Co., 110 U. S., 310, expressly holds that a power to collect money, the compensation of the agent to be paid out of the sum collected, is a power *coupled with an interest.* This is the latest decision of this court, and the controling one in so far as there may be any conflict between it and Hunt v. Rousmanier's Admr., 8 Wheat., 174 *supra.*

All the authorities agree that if the power is coupled with an interest it is irrevocable.

3. Again, as was said by Chief Justice Marshall in Hunt v. Ronsmanier *supra*—"Where a letter of attorney forms a part of a contract, and is a security for money, or *for the performance of any duty which is deemed valuable*, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law. * * * Although a letter of attorney depends from its nature on the will of the person making it, and may in general be recalled at his will, yet if he binds himself for a consideration, in terms *or by the nature of his contract, not to change his will, the law will not permit him to do so.* Rousmanier, therefore, could not, during his life by any act of his own, have revoked this letter of attorney."

The contract involved in the case at bar is one *inter partes* under seal, containing mutual stipulations. It is also supplemented with a bond given by the relator for the faithful performance of his contract. He is to proceed to collect the claims at his own expense, and his entire compensation is to be a certain part of the sums collected, viz., five per cent. on some of the claims and fifteen per cent. on the residue. *Supra*, pp. 6-10.

We submit that the above contract falls within the rule announced by Chief Justice Marshall *supra*. The very nature of the contract, as well as the provisions of the statute, shows that it was not remotely contemplated by the State to reserve the right to change its will and dismiss relator at its pleasure. The statute and contract recite that the relator is to prosecute the claims to *final settlement and collection*. (*Supra*, p. 6, also p. 22.) The necessary implication, if any implication is necessary, is that the relator's contract was not to be dependent upon the mere will and caprice of his principal.

What is implied in a contract pleading or statute is as much a part of it as what is expressed.

U. S. v. Babbit 1, Black.

Is it to be supposed that it was contemplated or intended that the relator should be bound on his part by his bond to prosecute the claims to final settlement and collection, (Laws of Mo., 1881, pp. 163-4,) and that the other contracting party could dismiss him at will? It is conceded by the demurrer, as well as in the opinion of the Supreme Court of Missouri, that the relator has incurred large expenses and has faithfully demeaned himself in the matter of his employment.

The object of construction is to find out what the parties intended to do.

Chesapeake, &c., v. Hill, 15 Wallace, 94.

Besides, courts lean in favor of construing a contract to be fair and reasonable; not unfair on one side and foolish on the other.

Bishop on Contracts (enlarged edition) sec. 400.

It is a cardinal rule of construction that statutes are to be construed as operating prospectively.

Cooley's Cons. Lim. (3d Ed.) p. 63.

State vs. Grant, 79 Mo., 119.

State, &c., vs. Greer, 78 Mo., 188.

In view of this well settled rule of construction, and in view of the further fact that, on the very day the Legislature of Missouri passed the act repealing the one of 1881, it also passed the one under which this proceeding was instituted, and which distinctly and expressly recognizes the continued existence of relator's employment: we say, in view of these facts, it is evident that the Legislature, by the enactment of the repealing act, did not intend to interfere with relator's contract, but could only have

intended to inhibit the making of any future contract, in case of the death of relator, or other legal termination of his employment.

4. "Where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, then, unless there is an express stipulation that it shall be revocable, it is, from its nature and character, in contemplation of law, irrevocable, whether it is expressed to be so on the face of the instrument conferring the authority or not."

Story on Agency, 9th Ed., sec. 477.

The contract in question falls within the doctrine above announced.

(a) It is a power coupled with an interest. (Jeffries v. Ins. Co., 110 U. S., 310.)

(b) It was given for a valuable consideration.

The contract is one *inter-partes and under seal*, and a consideration is therefore conclusively presumed. (*Supra*, pp. 5-8.) An instrument under seal imports a consideration.

U. S. v. Linn, 15 Peters, p. 315.

McConnel v. Brayner, 63 Mo., pp. 464-5.

(c) The relator, by the terms of the contract, was to pay his own expenses incurred in prosecuting the claims against the United States, that is in addition to performing the ordinary work of his employment, he was to advance for the State money sufficient to meet the expenses attendant upon the collections. We submit that his contract of employment should therefore be regarded as a part security for the advances, and that, for this reason, it is irrevocable.

In Marzion v. Pioche, 8 Cal., pp. 535-6, it was held that where the principal gives the power of attorney to provide the

means to return advances made by the agent, it is irrevocable. So in *Walker v. Denison*, 86 Ill., 142, cited as authority in the opinion of the Supreme Court of Missouri, the Supreme Court of Illinois, while holding the power of attorney there in question revocable, says "there was no proof that the attorney was to incur any expenditure of any kind."

5. The statute under which the contract with plaintiff in error was made, (Sec. 5,) provided in express terms that the amount of the commissions due plaintiff in error should be separated from the principal sums collected, and be paid directly to the agent by the proper officers of the United States. This, we submit, in effect, gave the agent a direct interest in part of the subject matter of the agency.

III.

The doctrine that a principal can ordinarily revoke the power of an agent rests on the ground that the agent has his remedy over against the principal for breach of contract, but in the case at bar there would be no right of action against the State, and the relator, if the judgment of the court below is sustained, is remediless. The case will be one of breach of contract, and no remedy for its enforcement.

An appeal to the Legislature of Missouri would be merely an appeal to the will and pleasure of the other party to the contract, and would, of course, be no remedy. "*But that is not an adequate remedy, the grant of which depends upon the will of the Legislature.*" "*When*," says Judge Story, "*we speak of the obligation of a contract, we include in the idea some known means acknowledged by the municipal law to enforce it.*' "

Bruce v. Schuyler, 4 Gilm. (Ill.) p. 278.

IV.

This cause coming to this court under the 25th section of the judiciary act, only the questions mentioned in the act can be reviewed here.

Rector v. Ashley, 6 Wallace, 143.

We refer to the opinion of the Supreme Court of Missouri contained in the record (88 Mo., 278) to show in part the Federal question arising in the case and the precise grounds of the decision of that court. By the statutes of Missouri the opinions of the Supreme Court are required to be reduced to writing and to be filed in the cause.

Rev. Stat. of Mo., 1879, sec. 3781.

V.

In High on Extraordinary Legal Remedies, section 94, it is said: "Where, however, the relator has been awarded the contract for printing the laws of a State, and the contract has been actually entered into, for the faithful performance of which he has given the required bonds, he may, by mandamus, compel the Secretary of State to furnish him with copies of the public laws for printing, notwithstanding the printing has been let to another under a subsequent law. In such a case the relator's rights are regarded as contract rights, and in as far as the subsequent law impairs their obligations, it is invalid, and constitutes no bar to relief by mandamus."

So in Board of Liquidation v. McComb; 92 U. S., 541, it is said "a State without its consent cannot be sued by an individual, and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official

duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are correlative to each other. In either case, if the officer plead the authority of unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."

The above language is cited and approved in Hagood vs. Southern, 117 U. S., p. 69.

Besides, the opinion of the Supreme Court of Missouri really concedes the propriety and efficacy of the proceeding by *mandamus* against the relator, and refuses the peremprory writ on the sole ground of the effect given the repealing act of 1885.

This case, on the authorities *supra*, and in view of the decision of the Missouri Supreme Court, cannot be held to be within the inhibition of the 11th amendment to our Federal Constitution.

WM. M. WILLIAMS,
Attorney for Plaintiff in Error.

125-331
125-329

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

THE STATE OF MISSOURI, AT THE RELATION OF JOHN R. WALKER, - - - *Plaintiff in Error*,

vs.

JOHN WALKER, STATE AUDITOR, *Defendant in Error*.

WRIT TO THE ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

B. G. BOONE,
Attorney-General of Missouri,
For Defendant in Error.

—IN THE—

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

THE STATE OF MISSOURI AT THE RELATION OF JOHN R. WALKER, PLAINTIFF IN ERROR,

vs.

JOHN WALKER, STATE AUDITOR, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT OF DEFENDANT IN ERROR.

On the 19th day of March, 1881, the Legislature of the State of Missouri (see Laws of Missouri, 1881, p. 163) passed an act to secure the adjustment of claims of the State against the United States for enrolling, equipping and subsisting the militia forces therein in suppressing

BRIEF.

I.

AGENCY, AUTHORITY OF PRINCIPAL TO REVOKE.

A principal who employs an agent may revoke the appointment at any time.

Story on Agency, 9th Ed., sec. 463.
Walker vs. Denison, 86 Ill., 142.
Blackstone vs. Buttermore, 53 Pa. St., 266.
Peacock vs. Cummings, 46 Pa. St., 434.
Chambers vs. Sea, 73 Ala., 372.

II.

AGENCY IRREVOCABLE WHEN POWER IS COUPLED WITH INTEREST.

It is only when the agent's power is coupled with an interest that it is irrevocable.

Hunt vs. Rousmanier, 8th Wheat. U. S., 174.
Hartley's Appeal, 53 Pa. St., 212.
Blackstone vs. Buttermore, Ib., 266.
Jeffries vs. Mut. Ins. Co., 110 U. S., 305–310.
Brown vs. Pforr, 30 Cal., 550.
Hutchins vs. Hebberd, 34 N. Y., 24.

III.

A POWER COUPLED WITH AN INTEREST DEFINED AND ILLUSTRATED.

a. A power coupled with an interest is a power which accompanies or is connected with an interest, in something then in existence. The power and the interest are united in the same person. If the interest is in that which is produced by the exercise of the power then it is not a power coupled with an interest, for the power to produce the interest must be exercised, and by its exercise it is extinguished. The power ceases when the interest commences, and therefore cannot be said to be coupled with it.

Hunt vs. Rousmanier, 8 Wheat. U. S., 174.
Barr vs. Schroeder, 32 Cal., 609.
Coffin vs. Landis, 46 Pa. St., 426.
Gilbert vs. Holmes, 64 Ill., 548.
Attrill vs. Patterson, 58 Md., 226.

b. A mere power to collect money and receive property, and to sell and convey property of the principal, the agent to have one-half of the net proceeds as compensation, is not a power coupled with an interest, and is revocable.

Bancroft vs. Ashurst, 2 Grant., 513.
Hartley's Appeal, 53 Pa. St., 212.

c. The interest which an agent must have in order to render his power irrevocable, must be an interest in the property on which the power is to be exercised, and not an interest in the money to be derived from the sale of property.

Barr vs. Schroeder, 32 Cal., 609.
Blackstone vs. Buttermore, 53 Pa. St., 266.

d. If the property is money, such as an amount due on a policy of insurance, and the agent's interest has been fixed by agreement with the principal before any power is attempted to be exercised, it will be irrevocable.

Jeffries vs. Mut. Ins. Co., 110 U. S., 530.

e. The relation which plaintiff in error sustained to the State of Missouri was that of a mere agent.

See act of March 19, 1881,
Session Acts of Missouri, p. 163.
State ex rel. Walker vs. Walker, 88 Mo., 299.

f. It was not an agency coupled with an interest. (Act of March 19, 1881, *supra*), but simply authority granted by the Legislature upon its appointment to *prosecute to final settlement* claims of the State againt the United States *at his own expense*, and to be *paid out of amounts collected.* There could be no power coupled with an interest in this because there is nothing definite, no subject matter in existence upon which a power could be exercised, much less an interest had: the claims were not property, but mere rights in action and only became tangible when an act of Congress gave them being.

IV.

CASES DISTINGUISHED.

a. The case of Jeffries vs. Mutual Ins. Co., 110 U. S., 305, is not parallel with the case at bar. In the Jeffries case an administrator having a policy of life insurance as a part of the assets of an estate agreed to and did transfer a definite interest in same to an attorney upon his collecting or compromising it. This was a contract between individuals in regard to private property. The amount due was certain and definite and had a material or substantial existence evidenced by the policy of insurance.

In the case at bar, the act passed by the legislature was in reference to claims of the State of Missouri against the United States. The act authorized the agent, not to collect money and receive part of the proceeds, but *to have Congress to enact and the proper departments at Washington to rule* that certain claims were due the State of Missouri by the United States.

In other words, the *power given the agent was, when exercised, to produce that in which the agent was to have an interest*, the interest to arise only upon the successful exercise of the power.

b. In the case of Hunt vs. Rousmanier, 8 Wheat., U. S., 174, the principal bound himself for a consideration by the terms and nature of his contract not to change the same, and the law, during his lifetime, did not permit him to do so. Upon his death, however, the power conferred not being coupled with an interest, ceased.

In the case at bar the State, as principal, did not, *for a consideration*, bind itself not to change or repeal the act creating the agency, and the power granted not being coupled with an interest no contract right was impaired by the repeal of the act.

Simpson vs. Carson, 11 Oregon, 361.

Phillips vs. Howell, 60 Ga., 411.

c. The case at bar is distinguished from that of Hall vs. Wisconsin, 103 U. S., p. 5, in this: In the former the agent was not appointed for any specified time, nor has he performed any services; while in the latter the party with whom the State contracted was appointed for a definite period, at a fixed salary and had performed the services under his contract.

Further, in Hall vs. Wisconsin, *supra*, the court, following the Dartmouth College cases, 4 Wheat., 518, says: When a legislature makes a contract with a public officer for his services *at a stipulated salary, during a limited period*, this, during the limited period, is as much a contract within the purview of the constitutional prohibition as a like contract between private citizens.

The case at bar presents no similar features. The act authorizing the employment of the agent was for no definite period. It provided for no compensation except out of claims secured or allowed to the State. The agent had rendered no services or acquired any other rights under the appointment when the law was repealed. No contract rights were impaired by the repeal, and the reasoning of the court in Hall vs. Wisconsin, *supra*, has no application here.

d. Speer vs. Barker, 4 Kan., 379, cited in High on Extraordinary Leg. Rem., § 94, is not a precedent for the determination of plaintiff in error's right to the papers claimed. In that case the contract was made with a party for a definite period for the printing of the State laws. This contract was not only authorized by an act of the legislature, but *enjoined by the constitution* of the State. A subsequent legislature attempted to modify the law under which the contract was made, so as to take the printing away from the party contracted with. The court held that this could not be done; that the party contracted with had acquired a property right to copies of the State laws from which to do the printing.

In the case at bar there is no constitutional provision requiring the agent's appointment. He was not appointed for a definite or limited period. The subsequent legislature did not attempt to modify the law and confer the agency upon another, but repealed it altogether.

The agent had rendered no services and acquired no right under the act authorizing his appointment. After its repeal he still seeks to assert his authority as agent under a separate and distinct act (Acts 1885, p. 203) in no way connected with the one which created his agency.

See Session Acts of Mo., 1881 and 1885.
Compare act of March 19, 1881, Laws 1881, p. 163 with
Act of March 28, 1885, Laws 1885, p. 203.

V.

SIMILAR CASES.

a, The case at bar is not unlike that class of cases where a State, by a legislative enactment, agrees to pay a certain amount to a person or persons who will do some particular thing supposed to be for the State's interest. It has been uniformly held that the repeal of such enactments does not impair the obligation of a contract.

Salt Co. vs. East Saginaw, 13 Wall., 373.
Cooley Con. Lim., 5th Ed., § 284.
Durkee vs. Board Liquidation, 103, U. S., 646.

b. Plaintiff in error had done nothing under the act creating his agency. He had contracted to act but had not acted. In such a case the State stands upon the same footing as an individual; while a grant or contract remains unexecuted and some further act is required to complete it, and no consideration in fact or presumed exists, the State may, through its legislature, revoke or repudiate the act in the same way that a similar transaction may be revoked between individuals.

Trustees vs. Rider, 13 Conn., 87.
Simpson vs. Carson, 11 Oregon, 361.

c. Or, viewed from another phase: A State may, at any time, abandon an enterprise which it has undertaken and by repeal of a law refuse to permit a contractor or agent to proceed; or it may even enter into a new contract for the performance of the same services by other persons, although its contractor or agent is not in default. While such a case would violate a contract, the obligation would not be impaired by the refusal of the State to perform it. The original party would have

a just claim against the State if not in the courts, then through the legislature, for any damages sustained by him from the breach of the contract.

Lord vs. Thomas, 64 N. Y., 107.

People vs. Banvard, 27 Cal., 470.

Bryan vs. Cuttle, 15 Iowa, 538.

d. An act of a State authorizing the adoption of text books for the use of the common schools does not, although a set of texts are adopted by the officers or agents of the State, as required by the act, constitute a contract with the publishers of the adopted books by which the State is bound to use the same in its schools. The act was a mere regulation imposed by the State upon itself which might be modified or abrogated at the pleasure of the legislature.

Bancroft vs. Thayer, U. S. Cir. Ct., Dist. Oregon, May 14, 1879.

The Reporter, Vol. VIII., p. 39.

VI.

ACTS OF A PUBLIC NATURE—POWER OF THE LEGISLATURE.

a. The act of March 19, 1881, was a public law relating to a public subject with respect to which the legislature enacting it had no power to bind a subsequent one. There was no stipulation or provision that any contract or employment that might be entered into under this act should remain in perpetuity.

b. All acts involving public interests are necessarily public laws. Each succeeding legislature posseses the same power with respect to them as its predecessors. The latter having the same power of repeal or modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. It is vital to the public welfare that each should be able at all times to do whatever the varying circumstances and present exigencies of the subject involved may require. If the legislature had intended that the agency authorized by the act of March 19, 1881, should be kept in perpetuity it would have said so. We are not authorized by any rule of construction to interpolate into the statute a thing so important which it clearly does not contain.

Newton vs. Com., 100 U. S., 548.